MASNIAH ABIDIN & ANOR v. SAFIRAH JAAN JAAFAR

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
AMELATI PARNELL JC
[CIVIL APPEAL NO: BKI-11B-1-1-2019]
29 SEPTEMBER 2021

Abstract – *The law does not put a strict liability on the owner and principal of day-care centres and kindergartens. Although there exists a duty of care towards the children, such duty of care must commensurate with their opportunity and ability to protect the minors from dangers that are known or that should be apprehended. This duty is not one to insure against injury but to take reasonable care to prevent it.*

TORT: *Negligence – Claim – Claim by mother against kindergarten/day-care and owner/principal – Allegations that child sexually molested – Child/alleged victim not called to testify – Whether non-calling of child detrimental to claimant's case – Whether injury/incident had been proven – Whether injury/incident reasonably foreseeable – Whether kindergarten/day-care and owner/principal took reasonable steps to protect child/alleged victim against risks*

EVIDENCE: *Adverse inference – Non-calling of material witness – Claim by mother against kindergarten/day-care and owner/principal – Allegations that child sexually molested – Child/alleged victim not called to testify – Whether non-calling of child detrimental to claimant's case – Whether adverse inference ought to be invoked – Evidence Act 1950, s. 114(g)*

This was an appeal by the first and second appellants ('first defendant' and 'second defendant' respectively) against the decision of the Magistrate in allowing the respondent's ('plaintiff') claim. The plaintiff was the biological mother and legal guardian of one four-year-old female child ('said child'). The first defendant was the owner and principal of the second defendant, a kindergarten/day-care for young children aged five years and below. Upon returning from the second defendant, the said child had informed the plaintiff that a male child who also attended the second defendant had sexually molested the said child by opening her pants and touching her private parts ('said incident'). On the same day, the plaintiff contacted one Feka, a teacher who worked at the second defendant and the first defendant to enquire more but they had no knowledge of the said incident and they refuted the allegations. The plaintiff and her husband then viewed the CCTV recordings where they found eight channels on the screen and one blank channel, which was channel 9. However, to their surprise, one of the CCTV recording, channel 6, which was operating normally the day before, had turned blank with an indicator of 'Video Loss'. The plaintiff and her husband suspected that it contained the said incident. The plaintiff felt uneasy and immediately

stopped sending the said child from attending the second defendant. At the Magistrate's Court, the plaintiff launched a tort action against the first and second defendants for failure to (i) provide sufficient physical observation on the children under their care that led to the said incident occurring; (ii) control and monitor the children's acts and behaviour against each other under their watch at all times; (iii) provide sufficient evidence through CCTV recordings to refute and confirm that the alleged incident never occurred; and (iv) ensure electrical monitoring devices such as the CCTV to be in good and workable form at all times to ensure the safety and wellbeing of the children under their care be secure. However, the said child was not called to testify. The plaintiff had called PW3, a consultant psychiatrist and the Head of the Department of Psychiatry and Mental Health at Queen Elizabeth Hospital, and PW5, a psychologist officer at Hospital Wanita dan Kanak-Kanak Sabah, to justify why the said child was not called to testify. The Magistrate accepted the testimonies of PW5 who testified that it was not advisable psychologically and medically to bring a young child of tender age to court as a witness in this case as she already passed the incident therapeutically. The plaintiff's claim was allowed. Hence, the present appeal by the defendants.

Held (allowing appeal; setting aside order of Magistrate):

(1) For the nature of operations like the second defendant providing day care and kindergarten for children five years and below, the first and second defendants owed duty of care towards the said child and the other toddlers or children while they were under their care. However, the law does not put a strict liability on the first and second defendants as the owner and principal. The duty of care of the first and second defendants to the minor must be commensurate with their opportunity and ability to protect the minor from dangers that were known or that should be apprehended. This duty not being one to insure against injury but to take reasonable care to prevent it. There was no clear finding of whether the injury *ie*, the said incident had been proven and that the injury was reasonably foreseeable and, assuming that it was, whether the first and second defendants took reasonable steps to protect the said child against those risks. (paras 25, 27, 28 & 31)

(2) The Magistrate misdirected herself on the point of the non-calling of the said child. No provision of law or case authority referred to support her view of applying flexibility based on the circumstances. The evidence and PW3 and PW5 could not be used in determining whether the said incident occurred or not because they were merely giving opinions and thus, their opinions fell under s. 45 of the Evidence Act 1950 ('EA'). Pursuant to that section, opinions of experts were relevant facts only 'when the court has to form an opinion based upon a point of foreign law or of science or art, or as to the identity or genuineness of

handwriting or finger impressions'. In this case, the Magistrate did not need to form an opinion upon any of the matters mentioned in s. 45 of the EA. The said incident was a question of fact which determination required evidence of facts, not evidence of opinions. (paras 42, 43 & 44)

(3) Nowhere in PW5's testimony did she say that the said child was medically unfit to testify. Although PW5 said it was unadvisable to bring the said child to court because she had already passed the said incident therapeutically, it was an established principle of law that it was the court that would decide whether a child is competent to testify. (paras 47 & 48)

(4) The burden of proof as to the alleged molest incident laid on the plaintiff. It was incumbent upon the plaintiff to produce the said child as a witness to prove the allegation. The failure to call the said child must be held against the plaintiff, in that an adverse inference under s. 114(g) of the EA ought to be invoked. In the absence of proof of the alleged injury to the said child, there was no risk of such injury which were reasonably foreseeable. (paras 53, 55 & 57)

(5) The Magistrate also misdirected herself when she made a finding that there was a possibility that the said incident occurred at other places. The plaintiff's pleaded case and evidence was that the said incident happened in front of the TV area. Making a finding of fact based on unpleaded facts and contrary to evidence was fatal. The Magistrate's finding of fact of the possibility that the said incident occurred at other locations in the second defendant's premises was against the weight of evidence. (paras 63-65 & 67)

Case(s) referred to:

Chan Sau Chuan v. Choi Kong Chaw & Yap Yun Chan [1991] 1 CLJ 297; [1991] 2 CLJ (Rep) 394 HC ***(dist)***

Government Of Malaysia & Ors v. Jumat Mahmud & Anor [1977] 1 LNS 29 FC ***(refd)***

Hassan Ali Basari v. PP [2018] 4 CLJ 561 CA ***(refd)***

Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 4 CLJ 1 CA ***(refd)***

Leong Hong Khie v. PP [1984] 1 LNS 172 FC ***(refd)***

Ng Siew Lan v. John Lee Tsun Vui & Anor [2017] 2 CLJ 245 FC ***(refd)***

Saiman Umar v. Lembaga Pertubuhan Peladang [2015] 9 CLJ 153 FC ***(refd)***

Selvaduray v. Chinniah [1939] 1 LNS 107 SC ***(refd)***

Silvadurai Kunnary & Anor v. Headmaster, SRJK Cina, Chung Hwa & Ors [1996] 2 BLJ 279 HC ***(refd)***

Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***

Tempil Perkakas Sdn Bhd v. Foo Sex Hong (t/a Agrodrive Engineering) [1996] 1 LNS 99 HC ***(refd)***

Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 SC ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 32, 45, 101, 102, 114(g), 118

For the 1st & 2nd appellants - Hamid Ismail; M/s Hamid & Co
For the respondent - Farazwin Haxdy; M/s Farazwin Haxdy & Assocs

Reported by Lina E

JUDGMENT

Amelati Parnell JC:

Introduction

[1] This is the first and second appellants' appeal against the decision of the learned Magistrate given on 16 January 2019 in allowing the respondent's claim and awarded general damages in the sum of RM30,000, special damages in the sum of RM1,500, suing cost in the sum of RM1,375 and advocacy cost in the sum of RM5,450.

[2] For the purpose of this appeal, the first and second appellants will be referred to as the first and second defendants, whereas the respondent will be referred as the plaintiff.

Plaintiffs' Pleaded Case

[3] The plaintiff is the biological mother and legal guardian of one four-year-old child (at the time of the incident) named "X" (hereinafter referred to as "the said child").

[4] The first defendant is and was at all material time the owner and principal of the second defendant, a kindergarten/day-care known as Tadika Khalifah Perdana @ Little Caliphs operating at Lot 129, 25 Lorong 3D, Taman Putera Perdana, 88450 Telipok, Sabah.

[5] The nature of business of second defendant is providing day-care services to toddlers and at the same time operating as Taska and/or kindergarten to young children aged five years and below.

[6] On 16 March 2016, upon returning from the second defendant, the said child had informed the plaintiff that a male child named "Y" (a four-year-old boy) who also attended the second defendant, had sexually molested the said child by opening her pants and touching her private parts (hereinafter referred to as "the said incident").

(*The details of both children are substituted with "X" and "Y" respectively in order to protect their identity and are as stated in the bundle of pleadings and notes of proceedings)

[7] On the same day, the plaintiff contacted one Feka, a teacher who works at the second defendant and the first defendant to enquire more on the said incident and not one of them have had knowledge on the said incident

and further refuted the allegations and concluded that such incident could have never happened as all children under the care of the second defendant are supposed to be monitored at all times and are divided accordingly to their gender and age.

[8] On 17 March 2016, a day after the said incident had occurred, the plaintiff together with her husband brought the said child to second defendant to make further enquiries and obtain clarifications from the first defendant and one Feka.

[9] The plaintiff had also sought permission from the teachers who worked with second defendant to view CCTV recordings of the second defendant specifically for the recordings on 16 March 2016 (hereinafter referred to as "the said CCTV recordings"), the day of the said incident, but was rejected and was told that only first defendant is privy to the access to any CCTV recordings of the second defendant.

[10] The plaintiff was granted permission to view the said CCTV recordings upon the arrival of the first defendant to second defendant but to the plaintiff's disappointment, the said CCTV recordings were unable for viewing due to the broken mouse at that particular of time and was further told by the first defendant that the said CCTV recordings can only be viewed within few days as the first defendant needed to get another mouse.

[11] The plaintiff was unhappy with the solution offered by the first defendant and offered to use her mouse instead when they returned back to second defendant at about 5pm on the same day. Notwithstanding the replaced new mouse by the plaintiff, the plaintiff was still unable to view the said CCTV recordings due to time constraints.

[12] The plaintiff and her husband confirmed that there were eight channels on the screen and only one blank channel which is channel 9 that was blank which was located at the last column of the CCTV screen during the first time they entered the CCTV recording room that day.

[13] On 18 March 2016, the plaintiff and her husband returned to second defendant to view the CCTV recordings and to their surprise, one of the CCTV recording channel namely channel 6 that was operating normally a day before had turned blank with an indicator of "video loss" in which the plaintiff and her husband suspected to contain the said incident.

[14] The respondent and her husband were suspicious of the video loss for channel 6 that might lead to the first defendant erasing the said CCTV video as one nor, one of the teachers who works with the second defendant could not give valid basis for the sudden video loss.

[15] The plaintiff who felt uneasy with what had happened immediately stopped sending the said child from attending the second defendant after failing to receive proper explanation and assistance on the said incident that had affected the said child and the plaintiff herself and her husband mentally, physically and financially.

[16] Particulars of negligence by first are second defendants as pleaded are:

(i) Failure to provide sufficient physical observation on the children under their care that lead to the said incident occurring;

(ii) Failure to control and monitor the children's acts and behaviour against each other under their watch at all times;

(iii) Failure to provide sufficient evidence through CCTV recordings to refute and confirm that the alleged said incident never occurred;

(iv) Failure to ensure electrical monitoring devices such as CCTV to be in good and workable form at all times to ensure the safety and wellbeing of the children under their care be secured;

Wherefore the plaintiff claims against the defendants:

(i) General damages amounting to RM95,000 including damages for:

(a) Pain and suffering of both child and parents;

(b) Loss of dignity of daughter due to molestation;

(ii) Special damages including the following;

(a) Transportation costs to police stations and hospitals	RM	1,500
(b) Payment to CCTV technician	RM	500
(c) Admission to anaesthetics ward for full physical check-up	RM	3,000
	RM	100,000

(iii) Statutory interest on general damages at the rate of 5% per annum or at such rate as the Honourable Court deems fit to award to be calculated from the date of this writ to the date of judgment; (iv) interest of 5% per annum on the judgment sum from the date of judgment to the date of full payment; (v) costs; and (vi) such further or other relief as may be just that this court deems fit and appropriate in the circumstances of this case.

(Refer to statement of claim, pp. 1 to 11, record of appeal).

Defendants' Case

[17] The defendants denied the alleged molest incident as averred by the plaintiff. Save as hereinbefore specifically admitted or pleaded thereto, the defendants deny each and every allegation contained in the statement of claim although the same were specifically set forth herein and traversed *seriatim*. (Refer to statement of defence, pp. 11 to 16, record of appeal).

Issues Tried

[18] The issues tried before the Magistrate's Court are as follows:

(i) Whether the first and second defendants (appellants) own duty of care towards the plaintiff (respondent)?

(ii) If the answer to the abovementioned is in the affirmative, whether the first and second defendants failed to exercise their duty of care towards the plaintiff and the said child?

(iii) If the answer to the abovementioned is in the affirmative, whether the first and second defendants are to be held liable for such negligence?

(iv) If the answer to the abovementioned is in the affirmative, what is the amount of compensation should the plaintiff be awarded?

Memorandum Of Appeal

[19] In the memorandum of appeal dated on the 14 January 2021, the first and second defendants appeal the whole of the decision of the learned Magistrate as follows:

(i) The learned Magistrate erred in law and in fact when she decided that the alleged incident in respect of the respondent's child *ie*, "X" ("the said child") did happen when:

  (a) The CCTV recording at the second defendant's premises on the exact location of the alleged incident did not show the occurrence of that alleged incident.

  (b) The evidence of PW1, PW3 and PW5 on the alleged incident were hearsay and against the physical evidence in this case, *ie*, the CCTV recording.

  (c) The learned Magistrate's finding that the alleged incident might have occurred in other location in the second appellant's premises was a departure from the plaintiff's pleading and against the weight of evidence.

(ii) The learned Magistrate erred in law and in fact for allowing and accepting the opinion given by PW2 as evidence of proof of breach of duty of care when PW2 was only a witness of fact and not an expert witness.

(iii) The learned Magistrate erred in law and in fact for holding there was negligence or the appellants had failed to exercise their duty of care towards the respondent and the said child by the appellants by relying on evidence irrelevant to the facts in issue or mere opinions of PW1 and PW2.

(iv) The learned Magistrate ought to have invoked adverse inference against the respondent for not calling the said child to testify as a witness during the trial.

(v) The learned Magistrate erred in law and in fact for holding that the respondent had proved the particulars of negligence when:

(a) the respondent did not bring evidence to prove those particulars;

(b) the respondent's evident departed from her pleading; and

(c) the respondent has raised new issue which was not pleaded in her pleadings.

(vi) The learned Magistrate erred in law and in fact when she failed to evaluate the appellants' evidence properly whereby the appellants' evidence was not challenged at all by the respondent during the trial. Hence, legally and factually, the appellants' evidence was deemed to be accepted by the respondent and therefore, the appellants had proven their defence.

(vii) The learned Magistrate erred in law and in fact for allowing the respondent's claim when the respondent had failed to prove her case on the balance of probabilities.

(viii) The learned Magistrate erred in law and in fact for awarding general damages, special damages and cost to the respondent when the respondent had failed to prove her case during the trial.

Analysis

[20] It is trite that an appellate court will be slow to interfere with the findings of facts and judicial appreciation of the facts by the trial court to which the law entrusts the primary task of evaluation of the evidence.

[21] The case of *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545, is instructive on this issue. Gopal Sri Ram JCA (as he then was) delivering the judgment of the Court of Appeal held (at p. 550):

> It is trite law that this Court will not readily interfere with the findings of fact arrived at by the Court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial Court has so fundamentally misdirected itself, that one may safely say that no reasonable Court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

[22] In the present case, the basis of the plaintiff's claim was premised on the alleged molest incident where on 16 March 2016, upon returning from the second defendant, her said child "X" had informed her that a male child named "Y" (a four-year-old boy) who also attended the second defendant, had sexually molested the said child "X" by opening her pants and touching her private parts.

[23] The said incident was said to have occurred at the second defendant's premises a kindergarten/day-care known as Tadika Khalifah Perdana @ Little Caliphs operating at Lot 129, Lorong 3D, Taman Putera Perdana, 88450 Telipok, Sabah.

[24] In determining the liability of the first and second defendants, it is subjected to certain test laid down by several settled case law where three essential ingredients must be fulfilled before the first and second defendants could be held liable, which are as follows:

(i) The existence of duty of care which was owed by the first and second defendant to the plaintiff at the material time (duty of care);

(ii) Failure of the first and second defendants to attain that standard of care prescribed by law and thereby committing a breach of such duty of care (breach of duty); and

(iii) Damage which was both causally connected with such breach and recognised by law had been suffered by the minor (causation).

Duty Of Care

[25] For nature of operation like the second defendant providing day care and kindergarten service for children five years and below, the first and second defendants owe a duty of care towards the said minor and other toddler or children while they were under their care. This was duly considered by the learned Magistrate in her grounds where she stated:

> We refer back to our present case, the 1st defendant is the owner and principal of the 2nd defendant, a kindergarden/day-care of Tadika Khalifah Perdana @ Little Caliphs. The victim was sent by the plaintiff to the said premise whereby the 2nd defendant provides day-care and kindergarden service for children 5 years and below. It is therefore well established that the 1st and 2nd defendant owns duty of care towards the victim and or the plaintiff. It was never disputed by any parties that 1st and 2nd defendant has no duty of care towards the plaintiff.

[26] In support, learned counsel for the plaintiff made reference to the case of *Government Of Malaysia & Ors v. Jumat Mahmud & Anor* [1977] 1 LNS 29; [1977] 2 MLJ 103 where it was held that:

A It is accepted that by reason of the special relationship of teacher and pupil, a school teacher owes a duty to the pupil to take reasonable care, for the safety of the pupil. The duty of care on the part of the teacher to the plaintiff must commensurate with his/her opportunity and ability to protect the pupil from dangers that were known or that should be apprehended and the duty of care required is that which a careful father B with a very large family would take of his own children (see *Ricketts v. Erith Borough Council* [1943] 2 All ER 629 631. It is not a duty of insurance against harm but only a duty to take reasonable care for the safety of the pupil. The duty is aptly described by the learned Chief Justice of Victoria in the judgment of the Full Court in *Richards v. State of Victoria* [1969] VR 139 141 when he said:

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> The duty of care owed by (the teacher) required only that he should take such measures as in all the circumstances were reasonable to prevent physical injury to (the pupil). This duty not being one to insure against injury, but to take reasonable care to prevent it, required no more than the taking of reasonable steps to D protect the plaintiff against risks of injury which *ex hypothesi* (the teacher) should reasonably have foreseen.

[27] As to the first element on duty of care, although the first and second defendants owe a duty of care towards the said minor, the law does not put a strict liability on the first and second defendants as the owner and principal E of a kindergarten/day-care of Tadika Khalifah Perdana @ Little Caliphs bearing the address of Lot 129, Lorong 3D, Taman Putera Perdana, 88450 Telipok, Kota Kinabalu, Sabah.

[28] As decided in *Government Of Malaysia & Ors v. Jumat Mahmud & Anor* (*supra*) that the duty of care of the first and second defendants to the minor F must commensurate with their opportunity and ability to protect the minor from dangers that were known or that should be apprehended. This duty not being one to insure against injury, but to take reasonable care to prevent it.

[29] Further it was quoted by Suriyadi J in the case of *Silvadurai Kunnary & Anor v. Headmaster, SRJK Cina, Chung Hwa & Ors* [1996] 2 BLJ 279; [1996] G MLJU 331, as follows:

> I further seek solace from the case of Zazlin Zahira Hj Kamarulzaman (an infant) suing by his father and next friend, *Hj Kamarulzaman b Mohd Ali lwn. Louis Marie Neube RT Ambrose a/l Ambrose & 2 Yg Ln* [1994] (3) ANR 47 2518 at page 2519 under held 1 which reads:
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> 1(a) Seorang guru bertanggungjawab menjaga keselamatan murid-murid di bawah jagaannya. Kewajipan berhati-hati ini mesti mengambil kira peluang dan kebolehan guru itu untuk melindungi murid-murid dari bahaya yang diketahui, dan tahap kewajipan ini adalah sama dengan kewajipan seorang bapa yang mempunyai anak ramai. Ia bukan I kewajipan menjamin tidak akan berlaku kemalangan, tetapi sekadar kewajipan berhati-hati dengan munasabah untuk menjaga keselamatan murid-murid. Undang-undang tidak meletakkan tanggungjawab yang keras (strict liability) ke atas guru.

Breach Of Duty

[30] Following the above authorities, the second element to be considered is whether there is such breach of duty by the first and second defendants. Again, reference is made to the decision by the Federal Court in *Government Of Malaysia & Ors v. Jumat Mahmud & Anor* (*supra*) which held as follows:

> ... in considering whether or not the appellants were in breach of their duty of care to the respondent it was necessary for the trial judge to consider **first whether the risks of injury to the plaintiff were reasonably foreseeable and secondly assuming it was, whether the appellants took reasonable steps to protect the respondent against those risks;**
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> (emphasis added)

[31] Having perused the grounds of judgment of the learned Magistrate in the present case, there was no clear finding of whether the injury *ie*, the alleged molest incident onto the said child "X" of the plaintiff had been proven and that the injury was reasonably foreseeable and secondly assuming it was, whether the first and second defendants took reasonable steps to protect the said child "X" against those risks.

[32] Hence, this issue must be first determined before the first and second defendants are said to have breach the duty of care.

[33] In the present case, the first and second defendants had urged the court not to believe the testimonies of PW1, PW3 and PW5 based on the following reasons:

(i) Their evidence is hearsay because they did not see the said incident and were merely told by the child about it.

(ii) The child's story about the said incident (as told to the plaintiff, PW3 and PW5) is contradicted by the physical evidence in this case, *ie*, the CCTV recording of channels 4 and 5. It is undisputed fact that CCTV channels 4 and 5 record the TV viewing area in which the said incident was pleaded to have occurred. The plaintiff's counsel agreed that after viewing the video recording of those two CCTV channels for the day of the said incident, *ie*, 16 March 2016, both channels did not record the said incident. This shows that the said incident did not occur. Accordingly, it proves that the child's story about the said incident is false. On the same basis, the evidence of the plaintiff, PW3 and PW5 is against the physical evidence too.

[34] The said child "X" was not called to testify. The incident as to the alleged molest come from plaintiff (PW1) where she testified that:

PW1 Witness Statement

Q8: What is the content of the police report dated 18 March 2016?

A: I made a report that my daughter complained to me on the 16 March 2017 that her friend. On the 17 March 2017 when we went to the kindergarten with the intention to view the cctv recording the owner Puan Masniah gave excuses that the cctv wireless mouse was broken by the kids and asked us to come back next day or the day after. We (me, my husband and Puan Masniah) confirmed that on the 17 March 2016, all eight cctv channel recordings are function well. Only on the 18 March 2016 did we realise that there is a video loss and when we asked why they couldn't provide us with satisfactory answer.

Q9: How did you come to know on this incident?

A: My daughter informed me verbally that her friend, child "Y" took off her pants and touched her private part.

Examination-In-Chief Of PW1

PC: Do you believe what your daughter told you and if yes why?

PW1: Yes I believe what she told me because she is only four years old and such things never been exposed to her never happen in her life before. A four years old child cannot create something that she never being exposed/know before.

Re-Examination Of PW1

PC: You were also asked:

"DC: I put it to you the alleged incident about your daughter did not happen, agree?

PW1: disagree"

Explain why you disagree?

PW1: A four years old kid who never been exposed to such sexual act called molesting she cannot create something beyond her knowledge and she kept repeating the same thing with the same name Child "Y". Her statement is consistent and coherent. There is no reason for a four years old kid to tell a lies for no reason.

PC: You were asked:

"DC: I put it to you that your daughter did not tell the truth about the alleged incident, agree?

PW1: disagree"

Why you disagree?

PW1: My answer will be the same as above.

[35] The above-quoted testimonies of PW1 are indeed hearsay evidence. In this regard I shall refer to the view expressed by Abdul Kadir Sulaiman J (later FCJ) (as he then was) in *Tempil Perkakas Sdn Bhd v. Foo Sex Hong (t/a Agrodrive Engineering)* [1996] 1 LNS 99; [1996] 5 MLJ 542 at p. 547 as follows:

> ... It is clear law that if anything is said or tendered through a witness which is not within the actual knowledge of the witness, anything said or tendered would remain inadmissible notwithstanding the omission to object by the opposing party. The opposing party cannot be taken to have admitted to what had been said and tendered.

[36] This is not a case where PW1 in the present case had the personal knowledge of the alleged molest incident. The Court of Appeal had in *Hassan Ali Basari v. PP* [2018] 4 CLJ 561; [2019] 1 MLJ 390 held as follows:

> [44] So, 'hearsay evidence' and 'information' are two different kettles of fish altogether. The information that PW1 gave to the appellant was not hearsay evidence for the simple reason that it was within his own personal knowledge. It was not something that he came to know of from a third party not called as a witness. It was what he saw with his own eyes and heard with his own ears and not what a third party told him. Learned counsel was therefore misconceived in contending that the information that PW1 gave to the appellant was hearsay evidence.

[37] On the treatment and value of hearsay evidence, the Federal Court in *Leong Hong Khie v. PP* [1984] 1 LNS 172, FC; [1986] 2 MLJ 206; [1984] 1 MLRA 599 observed, *inter alia*, as follows:

> The general rule is that hearsay evidence is not admissible as proof of a fact which has been stated by a third person. This rule has been long established as a fundamental principle of the law of evidence. To quote Lord Normand in *Teper v. R* [1952] AC 480, 486:
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> > The rule against the admission of hearsay evidence is fundamental. It is not the best evidence, and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken by another witness cannot be tested by cross-examination and the light which his demeanour would throw on his testimony is lost.
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> In our opinion, another reason is the danger that hearsay evidence may be concocted, fabricated and tailored to suit the witness's testimony. Notwithstanding this general rule certain exceptions have been recognised upon the ground of necessity or convenience. In Malaysia, these exceptions are set out in s. 32 of the Evidence Act 1950.

[38] In assessing the evidence of PW1, I have no hesitation to hold the considered view that the evidence of PW1 in this regard is nothing more than hearsay as it sought to prove, by that evidence, the truth of the matter. In the absence of other plausible affirmative evidence, I am constrained to find that the evidence of PW1 in this respect as inadmissible.

[39] The plaintiff had called PW3 and PW5 to justify why the said child "X" was not called to testify. PW3 is Dr Razifah binti Abdul Rahman working as Consultant Psychiatrist and Head Department of Psychiatry and Mental Health at Queen Elizabeth Hospital and has a working experience of 17 years. PW5 is Clarice binti Andrew, Psychologist Officer at Hospital Wanita dan Kanak-Kanak Sabah.

[40] In her judgment, the learned Magistrate referred to the testimonies of PW5 who testified that it is not advisable psychologically and medically to bring a young child of tender age to court as a witness in this case as she already passed the incident therapeutically. This resulted in the child, was not called to give evidence in court. The learned Magistrate further said that "It was also submitted by the doctors that attended the trial, PW5 that the plaintiff's child, upon numerous treatments and evaluation, found to be telling the truth, as per the witness's evaluation report."

[41] Further in her grounds, the learned Magistrate said:

> This court agrees that a 4 year-old child will never tell lies not even something she had not learn or exposed unless she had the experienced on that. It has to be noted as well that the child was only being sent at the 2nd defendant for about 1 month prior to the said incident therefore it is impossible for the child to make up story.
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> …
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> Based on the report of PW5 at pages 20 it is stated as follows:
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> > Reason for the referral was that she still having nightmares of the incidence of being molested …
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> At the time of the referral she was only 3 years and 11 months and she is the eldest of the 2 siblings and at the time of the trial commenced, she would have been 5 years old.
>
> The defendant stated that the child is competent enough to testify in court and relying on section 118 of the Evidence Act 1950. This court is unable to agree with the defendant. The child might be competent enough to testify in court but as a parent do you wish to put your 5 years old child to testify in court? This court is very much aware on the requirement of the law requiring the child to be a witness, but in some circumstances we need to be flexible in applying the law based on the circumstances arises. The said child was referred to psychiatry hospital after the alleged incident and is recovering and we do not want to put back the child to that situation and refreshes her memory. We should

follow the law but it needs to be applying with flexibility based on the circumstances. We do not need to have a 4 years old child to have gone through the process where we as an adult are also having difficulties if we have been put in such a manner. We can always refer back to the evidence given by PW1 and PW2 on the child condition after the incident happen.

[42] With respect, the learned Magistrate had misdirected herself on the point of non-calling of the said child "X". No provision of law or case authority referred to support her view of applying flexibility based on the circumstances. The evidence put forth by PW1 and PW2 for non-calling of the said child "X" does not falls under exceptions set out in s. 32 of the Evidence Act 1950.

[43] I am with learned counsel for the defendants that the evidence of PW3 and PW5 could not be used in determining whether the alleged molest incident had occurred or not because they were merely giving opinions and, thus, their opinions fall under s. 45 of the Evidence Act 1950. Pursuant to that section, opinions of experts are relevant facts only "when the court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions".

[44] In this case, the learned Magistrate did not need to form an opinion upon any of the matters mentioned in s. 45 of the Evidence Act. The alleged molest incident was a question of fact which determination required evidence of fact; not evidence of opinions.

[45] For the case of *Chan Sau Chuan v. Choi Kong Chaw & Yap Yun Chan* [1991] 1 CLJ 297; [1991] 2 CLJ (Rep) 394 referred to by the plaintiff's counsel, the fact of the case can be easily distinguished, in that it was a personal injury claim due to road traffic accident. The plaintiff himself was said to be medically unfit to testify as he had suffered severe brain injury as a result of the accident. The investigation officer, PW3 was held to be competent being investigating officer in traffic accident to give his views who went to the scene of the accident where he firstly studied the scene. He saw two cars at the scene and some scratch marks on the right half of the road as one faces Kuala Lumpur. Thereafter he drew a sketch plan of the scene of the accident and also made a key as to explanations of the various alphabetical markings and the relevant measurements of the distance between the said markings. The sketch plan and the key were tendered and marked as exhs. P3 and P3K respectively.

[46] In the present case, PW5 did not see the alleged molest incident but was told about it by PW1 which is obviously hearsay, unlike PW3 in *Chan Sau Chuan*'s case where he went to the scene of accident, saw the vehicle involved at the scene and drew a sketch plan and the marking.

[47] At QA 9 of her witness statement, PW5 testified that "Upon meeting with me at three occasions, child "X" did not have any psychiatric diagnosis." Nowhere in PW5 testimony that the said child "X" is medically unfit to testify.

[48] Although PW5 said that it is unadvisable to bring the child to court because the child had already passed the said incident therapeutically, it is established principle of law that it is the court that will decide whether a child is competent to testify. This principle is stated very clearly in s. 118 of the Evidence Act 1950:

> All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by **tender years,** extreme old age, disease, whether of body or mind, or any other cause of the same kind. (emphasis added)

[49] Learned counsel also relied on ss. 101 and 102 of the Evidence Act 1950. It was submitted that the plaintiff has failed to prove the negligence because the plaintiff did not prove the said incident which is the crux of the plaintiff's action. The first and second defendants further submitted that the plaintiff did not bring any evidence to prove this pleaded fact especially when the said child is not called to give evidence in court.

[50] This principle was decided by the Supreme Court in *Selvaduray v. Chinniah* [1939] 1 LNS 107; [1939] 1 MLJ 253 which held that s. 102 of the Evidence Act 1950 provides that the burden of proof rests upon the party who would fail if no evidence at all were on either side:

> The burden of proof under section 102 of the Evidence Enactment is upon the person who would fail if no evidence at all were given on either side, and accordingly the plaintiff must establish his case. If he fails to do so, it will not avail him to turn around and say that the defendant has not established his. The defendant can say 'It is wholly immaterial whether I prove my case or not. You have not proved yours'.

[51] The alleged molest incident was a question of fact which determination required evidence of fact. Evidence of Child Witness Act 2007 (Act 676) provides the manner in which a child could safely and comfortably give evidence in court.

[52] At this juncture it is appropriate to set out how the evidence of a child witness may be given pursuant to the Evidence of Child Witness Act 2007 (Act 676):

> 3(1) A child witness may, at any stage of a trial, give evidence in any one or a combination of the following manner:
>
> (a) by having a screen between him and the accused or a child charged with any offence;

(b) by live link; or

(c) by video recording.

(2) For the purposes of this section, any evidence given under subsection (1) shall be deemed to be evidence given in an open court.

[53] The burden of proof as to the alleged molest incident, therefore lay on plaintiff. Thus, it is incumbent upon the plaintiff to produce the said child "X" as witness to prove the allegation.

[54] The decision of the Court of Appeal in *Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 4 CLJ 1 at p. 9; [1996] 3 MLJ 627 at p. 635-line C-E is relevant on this point:

> He who alleges must prove such allegation and the onus is on the appellant to do so. See section 103 of the Act. Thus, it is incumbent upon the appellant to produce Tan Sri Basir as his witness to prove the allegation. The fact that the appellant was unable to secure the attendance of Tan Sri Basir as a witness does not shift the burden to the respondent to produce the witness and testify as to what he had uttered, as firstly, the respondent never raised such an allegation and, secondly, has denied even making one. For this very reason, the adverse inference under section 114(g) of the Act relied upon by the appellant cannot be accepted as establishing that if the witness had been produced, his evidence would work against the respondent. There is no obligation in law for the respondent to produce the witness as that obligation rests with the appellant, the party who alleges, and the fact that the appellant was unable to do so is fatal to his case. For this very reason too, the adverse inference under section 114(g) is invoked against the appellant.

[55] Therefore, the failure to call the said child "X" in the present case to testify, must be held against the plaintiff, in that an adverse inference under s. 114(g) of the Evidence Act 1950 ought to be invoked.

Whether The Risks Of Injury Were Reasonably Foreseeable?

[56] PW2 who is the father of the said child "X", testify that:

> PW2: Pada pendapat saya sekiranya terdapat pengawasan dari orang dewasa sepanjang masa di tadika tersebut insiden yang berlaku terhadap anak saya tidak sepatutnya berlaku di sana menunjukkan pihak tadika gagal menyediakan pengawasan yang secukupnya samada dari segi kehadiran orang dewasa atau cikgu atau rakaman CCTV sebagai bukti bahawa tidak ada kecuaian yang berlaku dan selalunya bila saya pergi ke tadika tersebut saya dapati pintu luar tadika tersebut selalunya tidak berkunci dan boleh dimasuki oleh sesiapa pun. Terdapat kanak-kanak yang bermain di luar premis tanpa pengawasan orang dewasa.

(see p. 15 of Supplementary Record of Appeal No. 2) is only giving opinion as witness of fact and not an expert witness.

[57] In the absent of proof of the alleged injury to the said child "X", there is no risk of such injury which was reasonably foreseeable.

[58] Further, the first and second defendants' main evidence *via* witness statement of the first defendant (DW1) states that:

Q7: The plaintiff alleged that (child "Y") had sexually molested (child "X") by opening her pants and touching her private parts inside the second defendant's premises on 16 March 2016. Is that true?

A7: No. It is not true.

Q8: Why is it not true?

A8: Because of two reasons. One is because the teachers did not see the incident happen. If other students saw it, they would have told the teachers. Second is because based on my view of the CCTV recordings inside the second defendant's premise of the day 16 March 2016, I did not see that incident happen.

Q9: How many CCTV cameras were installed at the second defendant's premises?

A9: 8 cameras. So the CCTV recordings have 8 channels.

Q10: Do you know where the alleged incident was alleged to have happened?

A10: Based on the information received from the plaintiff on 17 March 2016, it was in front of the TV viewing area which is located of the second defendant's premise.

Q11: Which CCTV channels recorded the area in front of the TV viewing area on 16 March 2016?

A11: Since the incident was alleged to have occurred in front of the TV viewing area which is located on the lower premise of the second defendant's premises, the relevant CCTV recordings would be channel no. 4 and channel no. 5.

(see pp. 99 to 116 (cross-examination of DW1) of Supplementary Record of Appeal No. 2)

[59] As submitted by learned counsel for first and second defendants, the plaintiff did not cross-examine DW1 on the main evidence quoted above. Similarly, the CCTV recordings of channels 4 and 5 which did not record the alleged incident, was not challenged at all by the plaintiff during cross-examination as quoted: (see p. 120 of supplementary record of appeal no. 2)

PC: I have view the CCTV recording and I confirmed that channel 4 and 5 did not record any such incident therefore there is no necessity to tender it as evidence in court

DC: no objection and I confirm. Defendant closed its case and no more witness to be called.

[60] As the plaintiff had not challenged or rebutted the main evidence and also the failure to cross-examine on vital issues on the facts of the case and evidence from the DW1, it must be deemed to be accepted as the truth in entirety. Hence, the first and second defendants had proven their defence that the alleged molest incident did not occur.

[61] The law on the above principle is trite. The Federal Court held in *Ng Siew Lan v. John Lee Tsun Vui & Anor* [2017] 2 CLJ 245; [2017] 2 MLJ 167:

[25] The effect of failure to challenge the plaintiff's evidence on this point is to render the 1st defendant's version wholly untenable. This is settled law and the following pronouncement by Lord Halsbury in the House of Lords case of *Browne v. Dunn* (1894) 6 R 67 is relevant:

> To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.

[26] The same point was lucidly explained by Mukharji J in *A.E.G. Carapiet v. AY Derderian* AIR 1961 Cal 359 in the following terms:

> The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprises at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is made comes to give evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or which that witness had any share. If he

A asked no question with regard to this, then he must be taken to accept the plaintiff's account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such
B subsequent testimony has no chance of being tested and corroborated.

[62] Perusing the line of cross-examination on DW1, the first and second defendants had indeed provided the service of duty of care that is expected to the pupil *ie*, take reasonable care, for the safety of the pupil.

C PC: dengan membayar amaun yang kamu katakan tadi apakah yang kamu dan defendan kedua berikan atau janjikan kepada ibubapa yang menghantar anak-anak ke sana?

DW1: *pendidikan, makanan, mandi tidur dan keselamatan*

D PC: setuju jika saya katakan berdasarkan jawapan kamu, kamu dan defendan kedua *menawarkan penjagaan sepenuhnya ke atas kanak-kanak yang dihantar dan kanak-kanak tersebut juga akan dijaga sepanjang masa oleh penjaga atas dasar umur mereka yang masih kecil setuju*

DW1: *Setuju* (emphasis added)

E *Error When the Alleged Molest Incident Had Occurred Based On Unpleaded Fact And Against PW1's Own Evidence*

[63] Further, the learned Magistrate has misdirected herself when she made a finding that that there was possibility that the said incident occurred at
F other places:

> There is possibility that the said incident might have occurred at other location in the premises. As stated by PW2, this court agree that the alleged incident might have been recorded at another channel apart from channel 4 and 5 which has been given to the plaintiff.

G (see p. 19 of Supplementary Record of Appeal No. 2)

[64] The plaintiff's pleaded fact was that the alleged molest incident occurred in front of the TV viewing area (see para. 7 of the statement of claim). PW1 too testified that her child mentioned the alleged molest incident occurred in front of the TV. Thus, the respondent's pleaded case
H and evidence was the alleged molest incident happened in front of the TV area.

DC: Di bahagian mana ia berlaku?

PW2: Di dalam bilik yang ada TV

DC: Bilik TV itu di bahagian bawah setuju?

I PW2: Setuju

[65] I am with the first and second defendants that making a finding of fact based on unpleaded fact and contrary to evidence is fatal. The then Supreme Court held in *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 that a decision based on an issue which was not raised by the parties in their pleadings is liable to be set aside.

[66] The Federal Court in *Saiman Umar v. Lembaga Pertubuhan Peladang* [2015] 9 CLJ 153 stressed the importance of the trial court not to decide issue which was not pleaded by parties:

> [40] In our view, there is merit in the submissions of learned counsel for the defendant. It is a well-settled legal principle that the court should not decide on an issue that was not pleaded by the parties as had been decided in *Yew Wan Leong v. Lai Kok Chye* (*supra*) where the Supreme Court cited *Janagi v. Ong Boon Kiat* [1971] 1 LNS 42; [1971] 2 MLJ 196 and agreed with the following passage of Sharma J which stated:
>
> > The Court is not entitled to decide a suit on a matter on which no issue has been raised by the parties, it is not the duty of the Court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact it is not proper for the Court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance.
>
> [41] We should remind ourselves that parties to an action are bound by their own pleadings. It is therefore necessary to make the point that the court is also bound by the pleadings in as much as the parties themselves. The most important purpose of pleadings is to plead reasonable cause of action, define the issues of fact and questions of law to be determined by the court. It is a valid argument to make that the court is constrained to decide an action on which no issue has been raised by the parties in their respective pleadings (*Ambank (M) Bhd v. Luqman Kamil Muhammed Don* [2012] 3 CLJ 551; [2012] 3 MLRA 459 and *Victory Avenue Mfg (M) Sdn Bhd v. Matsushita Electronic Devices (M) Sdn Bhd* [2009] 1 LNS 296; [2009] 5 MLJ 243).

[67] As pointed out by learned counsel for first and second defendants, the learned Magistrate's finding of fact of the possibility that the said incident occurred at other location in the second defendant's premises is against the weight of evidence. The CCTV recordings of channels 4 and 5 at the second defendant's premises on the exact location of the alleged incident (in front of the TV area) on the day of the alleged molest incident did not show the occurrence of the said incident. This was admitted by the plaintiff's counsel who had watched the said CCTV recordings. According to the plaintiff's

counsel, since both channels did not record the said incident, there was no necessity to tender the CCTV recordings as evidence in court (see p. 120 lines 8 to 10 of Supplementary Record of Appeal No. 2). This admission indicates that the alleged molest incident did not occur. The learned Magistrate ought to have considered this admission because it was based on physical evidence.

Conclusion

[68] Having considered all facts in this matter as highlighted above, on the available evidence before it, I am persuaded that there are merits in this appeal warranting intervention.

[69] The order of the learned Magistrate is set aside. The appeal of the first and second defendants is allowed with costs of RM5,000 subject to payment of allocator fee.